Toffoloni v. LFP Publishing Group, LLC Doc. 73 Att. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,) as Administrator and Personal) Representative of the ESTATE) OF NANCY E. BENOIT,)) Plaintiff,)) vs.)) **LFP PUBLISHING GROUP, LLC,**) d/b/a Hustler Magazine, et al,)) Defendant.)	CASE NO. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION
FOR PROTECTIVE ORDER

EXHIBIT D

Dockets.Justia.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

DEFENDANT LFP PUBLISHING GROUP, LLC'S RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES

COMES NOW Defendant LFP Publishing Group, LLC (hereinafter "LFP") and respectfully responds to Plaintiff''s First Interrogatories to Defendant as follows:

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

LFP objects to the "Note" to Definition No. 9, which directs LFP's responses to be "continuing" to a broader extent than required or permitted by Fed. R. Civ. P. 26(e). The instruction will be complied with (unless otherwise specified in a specific response) to the extent that Fed. R. Civ. P. 26 requires, and LFP will supplement its responses as required by Rule 26(e).

RESPONSES TO SPECIFIC INTERROGATORIES

(1)

Please state the name, address, telephone number and occupation, job or profession of each person whom you expect to call as an expert witness upon the trial of this case and with respect to each such person, please state:

(a) the subject matter on which the expert is expected to testify;

(b) the substance of the facts and opinions to which the expert is expected to testify; and

(c) a summary of the grounds for each opinion.

RESPONSE:

None at this time.

(2)

Please state the name, address, telephone number and occupation, job or profession of any expert who has been consulted, retained, or specially employed by you or, to your knowledge, by anyone else in anticipation of this litigation or in preparation for trial, and who may have knowledge of any of the facts in this case.

RESPONSE:

None at this time.

(3)

Identify, as that term is defined herein, *supra*, any persons known to the Plaintiff [sic] to have any knowledge regarding the facts and circumstances surrounding the occurrences referred to in the Complaint, state what facts are believed to be known by each person, and state whether written or recorded statements have been taken from any of these persons, and, if so, identify which persons have given such statements.

RESPONSE:

LFP assumes this interrogatory seeks identification of persons known to LFP, and not Plaintiff, and responds accordingly as follows:

(a) *See* the individuals listed in LFP's Initial Disclosures, Docket Index ("D.I.") 52 at Attachment A.

(b) James Daus, address unknown, who LFP believes may have knowledge of the circumstances of the creation of the images of Ms. Benoit published by LFP, the ownership of those and other images of Ms. Benoit, and Ms. Benoit's effort to sell, exploit, or otherwise use those and other images of herself.

(c) Additional individuals unknown to LFP but known to Plaintiff or others familiar with Ms. Benoit's professional and modeling career, including, among others, her agents, promoters, publicists, and employers.

(4)

If you have refused to respond, or withheld information or documents in response to any of these Interrogatories or Requests for Production of Documents in reliance on any privilege or doctrine of trial preparation material, please state the privilege (or doctrine) asserted, and describe the information or document withheld with sufficient specificity as to allow a judicial determination as to whether the doctrine or privilege is applicable.

RESPONSE:

At this time no information was and no documents have been withheld on the basis of an asserted attorney-client or work product privilege. If at any time documents responsive to these Interrogatories or Plaintiff's Request for Production of Documents are withheld on the basis of an asserted privilege, LFP will promptly supplement this response and identify with specificity the information or document withheld, the privilege asserted and bases therefor.

(5)

Identify each and every instance, including, but not limited to, magazines videos, DVDs, internet sites, content, movies, or any other medium in which the Defendants, or any of them, or any parent company, partner, agent, affiliate, or licensee of any Defendant published, broadcast, displayed, or otherwise disseminated or made available to the public nude and/or partially nude images (hereinafter the "images") of Nancy Elizabeth Benoit (hereinafter "Ms. Benoit").

RESPONSE:

The only images of Ms. Benoit published or otherwise made available to the public by LFP are those found in the printed edition of the March 2008 issue of *Hustler* Magazine, a copy of which will be produced to Plaintiff.

(6)

Provide a complete accounting of all money, revenue, fees, income or other things of value received by Defendants, or any of them, as the result of sales or licenses of any media containing images of Ms. Benoit.

RESPONSE:

In accordance with Fed. R. Civ. P. 33(d), Plaintiff is directed to documents to be produced evidencing the total worldwide sales of the March 2008 issue of *Hustler* Magazine.

(7)

For purposes of Plaintiff's claim for punitive damages, state the net worth of Defendant LFP Publishing Group, LLC for the years ending 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of LFP do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation.

Plaintiff's suggestion that the requested information is relevant "for purposes of [her] claim for punitive damages" is contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")). In accordance with Fed. R. Civ. P. 33(d), LFP directs Plaintiff to documents to be produced by LFP evidencing its total worldwide sales of the March 2008 *Hustler* Magazine containing the images at issue in this case.

(8)

For purposes of Plaintiff's claim for punitive damages, state the net worth of LE Publishing, LLC for the years ending 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party LE Publishing Advisors, LLC do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. Further, LFP is a separate and distinct legal entity from LE Publishing Advisors, LLC, and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party LE Publishing Advisors, LLC, which there is not, Plaintiff's suggestion that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less LE Publishing Advisors, LLC, in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even a party's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct.

1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

(9)

For purposes of Plaintiff's claim for punitive damages, state the net worth of L.F.P., Inc. for the years ending 2006, 2007, 2008, and 2009 to date.

RESPONSE:

LFP objects to this Request as seeking information of a non-party to the case, seeking information that is irrelevant to any claim, defense or issue in this case, not reasonably calculated to lead to the discovery of admissible evidence, and because it seeks confidential, non-public financial information that is not germane to any legitimate issue in this case. The net worth and financial condition of non-party L.F.P., Inc. do not relate in any way to whether LFP violated Nancy Benoit's Georgia law right of publicity, and are thus wholly irrelevant to the subject matter of this litigation. Further, LFP is a separate and distinct legal entity from L.F.P., Inc., and is not in legal possession or control of that entity's information.

Even if there were any basis for Plaintiff to seek discovery from non-party L.F.P., Inc., which there is not, Plaintiff's suggestion that the requested information is relevant "for purposes of Plaintiff's claim for punitive damages" is incorrect and contrary to law. First, O.C.G.A. § 51-12.5.1 permits an award of punitive damages for violation of the Georgia right of publicity only where the alleged use of the images at issue was "of a character to import a premeditated or conscious and deliberate continuation of the appropriation." *Cabaniss v. Hipsley*, 114 Ga. App. 367 (1966). Plaintiff has alleged no such premeditated or conscious and deliberate misconduct by LFP, much less L.F.P., Inc., in her Complaint; and were she to do so, such allegations would be frivolous because LFP reasonably, in good faith, and in reliance on advice of counsel believed (and still believes) it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue.

Second, a claim for punitive damages, were it to be properly pleaded, made in good faith and solidly based in fact, would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c) *and State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.

408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.")).

(10)

Identify each and every instance in which Defendants' agents, employees, partners, or licensees discussed or communicated in any way about the subject of the Defendants' plans to publish or disseminate, and the publishing of the images of Ms. Benoit. This request includes all internal and external emails, memoranda, facsimiles, and notes of oral discussions by, among, and between Defendants' agents, employees, partners, or licensees, wherever located, concerning the subject of Defendants' acquisition of, payment for, publication, licensing and/or revenues from and potential liability for the dissemination of nude and partially nude images of Ms. Benoit.

RESPONSE:

In accordance with Fed. R. Civ. P. 33(d), LFP will produce its documentary files regarding the decision to publish the images of Ms. Benoit. Because one or more of the individuals with knowledge of the subject matter described in this interrogatory is no longer employed by LFP, LFP is at this time unable to describe with specificity each and every undocumented communication among LFP's agents and employees regarding the decision to publish the images of Ms. Benoit.

LFP is attempting to gather additional information responsive to this interrogatory and expects and reserves its right to supplement this response. LFP further states that it expects its response to this interrogatory, whether in documentary or narrative form, to include evidence of LFP's advice from outside counsel on the issue of whether the publication of the images of Ms. Benoit was lawful. LFP acknowledges that such disclosure is a limited waiver of its attorney-client privilege on the limited subject matter of the decision to publish the images of Ms. Benoit.

(11)

Identify the amount of money or other things of value Defendant LFP Publishing Group, LLC or any related person or entity paid Mark Samansky for nude and/or partially nude images of Ms. Benoit.

RESPONSE:

In accordance with Fed. R. Civ. P. 33(d), Plaintiff is directed to the documents to be produced by LFP.

(12)

Identify the person and/or persons who made the decision to publish and/or authorized the publication and/or licensing of nude and/or partially nude images of Ms. Benoit in the so-called "March 2008" edition of "Hustler Magazine."

RESPONSE:

(a) Bruce David, Editorial Director of *Hustler* Magazine.

(b) Tyler Downey, former Editor of *Hustler* Magazine.

(13)

Identify any document signed by Ms. Benoit, or anyone purporting to act on her behalf, relating to the images of Ms. Benoit published in the March 2008 edition of Hustler Magazine.

RESPONSE:

There are no such documents known to LFP at this time.

(14)

Identify each and every instance in 2006, 2007, 2008 and 2009 to date, when the Defendant LFP Publishing Group, LLC or any affiliated company, paid a model, celebrity, actor or other performer or private individual for the use of nude images of any such persons, and the amount paid to each such person.

RESPONSE:

LFP objects to this Request as overbroad, seeking information of non-parties, and because it seeks private and confidential, non-public financial information of LFP and non-parties. LFP further notes that the images of Ms. Benoit at issue in this case and published by LFP are not comparable in type, nature, quality or value to images obtained by LFP from models, celebrities, actors or private individuals for use of nude images of such persons for publication in *Hustler* Magazine and thus LFP's payments, if any, to such models, celebrities or private individuals is not probative of any issue in this case.

In accordance with Fed. R. Civ. P. 33(d), LFP will produce documents which reflect the compensation paid for the images of Ms. Benoit at issue in this case. Counsel for LFP will also agree to meet and confer with counsel for Plaintiff to discuss an appropriate scope for LFP's response to this interrogatory, and entry of an appropriate protective order governing the use of confidential financial information produced in discovery in this case.

(15)

Identify the person who has custody and control of the documents identified in Interrogatories numbered (1) through (14) above.

RESPONSE:

The documents identified and to be produced in response to the foregoing interrogatories are in the custody and control of Donna Hahner and Bruce David.

[Signature On Following Page]

Respectfully submitted November 30, 2009.

James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537
Darrell J. Solomon
Georgia Bar No. 305922

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Pro hac vice:

Paul J. Cambria, Jr.
Jeffrey Reina
William M. Feigenbaum

LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333
(716) 849-1315 (facsimile)

Attorneys for LFP Publishing Group, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT

VERIFICATION

I, Donna Hahner hereby verify that I am authorized to make this verification on behalf of Defendant LFP Publishing Group, LLC, and that the statements made in the foregoing Defendant LFP Publishing Group, LLC's Responses to Plaintiff's First Interrogatories are true and correct to the best of my knowledge, information and belief.

____
[name]

Sworn to and subscribed before
me this ____ day of November, 2009.

SEE ATTACHED
JURAT

____
Notary Public

My Commission Expires: __________

CALIFORNIA JURAT WITH AFFIANT STATEMENT

☒ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

1 ~~____________________________~~
2 ~~____________________________~~
3 ~~____________________________~~
4 ~~____________________________~~
5 ~~____________________________~~
6 ~~____________________________~~

Signature of Document Signer No. 1 — Signature of Document Signer No. 2 (if any)

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 25th day of November, 2009, by
Date — Month — Year

(1) Donna Hatner, Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) ~~(,)~~

(and

(2) ~~________________~~, Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

COURTNEY EVAN VITTI
Commission # 1738456
Notary Public - California
Los Angeles County
My Comm. Expires Apr 13, 2011

Place Notary Seal Above

Signature [signature] Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Civil Action (Verification)

Document Date: Nov. 25, 2009 Number of Pages: 1

Signer(s) Other Than Named Above: ~~____________~~

RIGHT THUMBPRINT OF SIGNER #1
Top of thumb here

RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here

©2007 National Notary Association • 9350 De Soto Ave., P.O. Box 2402 • Chatsworth, CA 91313-2402 • www.NationalNotary.org Item #5910 Reorder: Call Toll-Free 1-800-876-6827

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **Responses to Plaintiff's First Interrogatories** upon Plaintiff's attorney of record via Federal Express to:

Richard Decker, Esq.
Hallman & Wingate, LLC
166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060

This 30th day of November 2009.

S. Derek Bauer

Attorney for Defendant
LFP PUBLISHING GROUP, LLC